No. 88-1874

Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION, CROSS-PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY AND FRVR CORPORATION, CROSS-RESPONDENTS

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM OF CROSS-RESPONDENT INTERSTATE COMMERCE COMMISSION

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JUNE 12, 1989

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STATEMENT

Cross-Respondent Interstate Commerce Commission ("Commission") respectfully submits that the cross-petition filed by Railway Labor Executives Association ("RLEA") and United Transportation Union ("UTU") in Docket No. 88-1874 further supports a grant of the petition for a Writ of Certiorari filed by Chicago & North Western Transportation Company ("C&NW") and FRVR

Corporation ("FRVR") in Docket No. 88-1706. However, the Commission urges the Court to grant the petition in Docket No. 88-1706 rather than that of cross-petitioners.

Docket No. 88-1706, as well as other petitions now before the Court, presents the issue of whether Commission authorization of the disposition of rail property results in displacement by the Interstate Commerce Act (ICA) of the Railway Labor Act (RLA) or the Norris-LaGuardia Act (NLGA) as the mechanism for resolving labor disputes arising in the course of implementing the Commission authorized transaction. Also, the Court held oral argument on March 29, 1989, in two cases involving the identical issues. *Pittsburgh & Lake Erie R.R. Co. v. RLEA,* Nos. 87-1589 and 87-1888. (Our support of the petition in Docket No. 88-1706 is premised on the assumption that the Court has not decided those issues). The cross-petition, however, raises an additional issue—the issue of an agency's supposed lack of jurisdiction to opine upon the limits of its own statutory authority—that neither merits the attention of this Court nor is necessary to the resolution of the principal issues raised by all parties to these proceedings.

1. There are no significant differences among the facts of the case as presented by petitioners and cross-petitioners. Briefly, the facts are as follows:

C&NW and FRVR entered into an agreement for C&NW to sell and FRVR to buy a line of railroad known as "Duck Creek South" pursuant to 49 U.S.C. 10901. Under this section of the ICA the Commission promulgated the procedures in Ex Parte 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) (mem.) (*Ex Parte 392*"). *Ex Parte 392* authorizes the sale of such lines via an exemp-

tion from the statutory provisions governing the sale of rail property to new entrants into the railroad industry. The procedures protect the interests of any opposition to the transaction through the mechanism of the filing of a petiton to revoke the exemption.

C&NW and FRVR filed an exemption notice accompanied by a "petition for clarification" asking the Commission to clarify its view as to the "agency's exclusive jurisdiction over labor issues arising out of ICC authorized transactions." RLEA filed a petition to revoke the exemption and opposed the petition for clarification.

The Commission served a decision responding to the petition for clarification, Finance Docket No. 31205, *FRVR Corporation-Exemption, Aquisition and Operation-Certain Lines of Chicago and North Western Transportation Company-Petition for Clarification* (served January 29, 1988). There the Commission expressed its view that the ICA grants the Commission exclusive and plenary authority to authorize certain transactions that of necessity encompasses the authority to resolve any labor disputes that would act as obstacles to the consummation of the transaction authorized by the Commission. RLEA filed a petition for review of this decision with the Eighth Circuit Court of Appeals. (*RLEA v. ICC*, No. 88-1280). In its petition RLEA asserted that the Commission lacked the authority to issue any decision on the question of the ICA's relationship to any other law but that if the Commission possessed such authority its decision was incorrect on the merits.

An Eighth Circuit panel unanimously upheld the Commission's right to issue the order under review, but held that the Courts and not the Commission were the final arbiters of the reach of the Commission's jurisdiction. *RLEA v. ICC*, 861 F.2d 1082 (8th Cir. 1988). In so doing, it relied upon a prior decision holding that the RLA must

be accommodated to the Commission's "authority to supervise and implement labor protective conditions in terms of sales, acquisitions and abandonments . . . insofar as this authority is necessary to assure fair wages and working conditions". 861 F.2d 1083, quoting, *Burlington Northern R.R. Co. v. United Transportation Union*, 848 F.2d 856, 864 (8th Cir. 1988) (Fagg, dissenting). The majority of a divided panel, failed to uphold a comparable accommodation of the NLGA to the ICA for the reasons set forth in the prior decision and Judge Fagg reiterated his dissent. These issues are before the court in the petition filed by C&NW and supported by the Commission.

2. It is clear that all parties agree that the issues presented by the C&NW petition (No. 88-1706) are extremely important to the entire rail industry and to the administration of the ICA, RLA and the NLGA. (See, for example, Commission brief in No. 88-1706, p. *9*; Brief of United States As Amicus Curiae in Nos. 87-1589 and 87-1888). However, the instant cross-petition while raising these vital issues, also raises a non issue, the Commission's supposed lack of jurisdiction to render a declaratory order clarifying the provisions of the statute it is charged with enforcing.

In its attempt to put this issue before the Court RLEA first misconstrues the holding of the court below by contending that the Commission was held to be without authority to issue the challenged order. This is not so. Rather, the Eighth Circuit panel found the courts to be the ultimate authority on questions of the accommodation of the RLA and NLGA to the ICA. 861 F.2d at 1083. An unexceptional formulation of a basic principle with which the Commission has no quarrel. That however, is a far cry from RLEA's position that the agency is without jurisdiction to issue a declaratory order interpreting the statute it is charged with enforcing should that interpretation in

anyway involve another statute. (Cross-petition, p. 10). RLEA's argument is meritless.

To arrive at its extraordindary position RLEA misconstrues several of this Court's precedents. Most egregiously, cross-petitioners misuse *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), (*McLean*) to support the position that if the Commission has no authority to enforce other laws (*i.e.*, RLA and NLGA) it cannot issue any order construing its statutory authority in light of other statutes. *McLean* does not support RLEA. Indeed, *McLean* supports the Commission's view of its ability to issue declaratory orders that touch upon other statutes.

> Congress has vested . . . ICC with broad discretion and has charged them with the duty to execute stated and specific statutory policies. . . . The Commission's task is to enforce the ICA and other legislation which deals specifically with transportation facilities and problems. . . . But in executing those policies the Commission may be faced *with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true it cannot without more ignore the latter. The precise adjustments it must make, however, will vary . . . depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily . . . concerned.* 321 U.S. at 80. (Emphasis added).

McLean is clear authority that an administrative agency, faced with inconsistent or overlapping legislation, has a duty to deliberate and arrive at a reasoned decision with respect to the relative positions of the statutes in question. RLEA denies the existence of such a right.

Moreover, RLEA's position is inconsistent with the decision of this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). (*Chevron*). This Court has long upheld agencies' construction of their jurisdiction or statutory authority and held that the agency should be afforded the opportunity initially to construe its governing statutes. As long as the construction of the agency is reasonable the court defers to the agency's reading of the statute. See, the numerous decisions of this Court collected in Mr. Justice Scalia's concurring opinion in *Mississippi Power & Light Company v. Mississippi, Ex. Rel. Moore*, 108 S.Ct. 2428 (1988). RLEA would eliminate this settled practice.

In place of the settled practice of Congress leaving to the agency resolution of ambiguities with respect to its jurisdiction, *Cf. Chevron, supra* at 843-844, with review of the agency decision lodged in the courts of appeals, RLEA champions an approach that would result in chaos. Not only would an agency not have any authority to construe the statute it is charged with enforcing but also the courts of appeals would not have jurisdiction to decide the issue (Cross-petition, p. 11). How the matter would be resolved is not clear, but, in any event, does not merit the consideration of this Court.

CONCLUSION

Cross-Respondent Interstate Commerce Commission respectfully requests that the cross-petition in No. 88-1874 be denied. The petition in Docket No. 88-1706 should be granted and held in abeyance for disposition in light of the Court's disposition of Docket Nos. 87-1589 and 87-1888.

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☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—237-704/62065